(2)

No. 94-865

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RÜTGERSWERKE, AG,

Petitioner,

v.

KAY BETTIS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENNIS E. MURRAY, SR.
Counsel of Record

KIRK J. DELLI BOVI
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: (419) 624-3000

Counsel for Respondents

November 30, 1994

---

13 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

REASONS FOR DENYING THE PETITION. 1

I. Aerospatiale Was Properly Decided And Has Proven Workable In Practice 3

II. The Judicial System-Abusing Stratagem Employed By Petitioner To Bring This Issue Before This Court Precludes Petitioner's Entitlement To Review 5

III. Pied Piper-Style Commentaries By Some Students, Academics And Practitioners, Without Anything More, Are An Insufficient Basis For This Court To Reconsider And Reverse A Recent Decision That Has Been Well-Received By Everyone Else, Including The Federal And State Courts. 6

IV. Petitioner Never Asserted, In The Lower Courts, That Aerospatiale Should Be Reversed. Petitioner May Not Do So, For The First Time, In This Court 8

V. Petitioner Is Before This Court Only To Delay, For As Long As Possible, The Commencement Of Trial In This Five Year-Old, Certified Environmental Class Action. 9

CONCLUSION. 9

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Erbach Finance Corp. v. Royal Bank of Canada, 199 App.Div.2d 87, 605 N.Y.S.2d 52 (First Dept. 1993) 4

Haynes v. Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988) 4

Hudson v. Herman Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y 1987). 4

Knight v. Ford Motor Co., 260 N.J. Super. 110, 615 A.2d 297 (1992) 4

Moake v. Source International Corp., 263 N.J. Super. 455, 623 A.2d 263 (1993). 4

Scarminach v. Goldwell GmbH, 140 Misc.2d 103, 531 N.Y.S.2d 188 (1988). 4

Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987) 2-10

STATUTES/TREATISES:

Fed. R. Civ. P. 12(b)(2) 5

The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 255, T.I.A.S. No. 7444, 28 U.S.C.A. §1781 (1994) 2-10

No. 94-865

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RÜTGERSWERKE, AG,

Petitioner,

v.

KAY BETTIS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Petitioner requests this Court to review a unanimous appellate court denial of its petition for a writ of mandamus. Petitioner does so in order that it may launch an attack -- never made in the courts below -- on

this Court's holding in Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987). Aerospatiale is sound in principle and workable in practice. The decision has been approved, followed and properly implemented by federal and state courts alike. The clear majority of post-Aerospatiale decisions, including the lower court rulings in this action, have ordered discovery under the federal rules, while a minority has required discovery pursuant to the Hague Evidence Convention. This is how it should be with any case-by-case analysis. No state supreme court or federal court of appeals -- apart from the case at bar -- has considered Aerospatiale. Only a handful of students and academics, unfamiliar with the workaday world of international discovery and litigation, along with a few practitioners furthering the interests of their foreign clients, have proffered any criticism.

Mandated discovery, pursuant to the Hague Evidence Convention[1] in every case, would create an unlevel playing field -- not only between foreign entities operating in the United States and their domestic competitors -- but also between foreign entities who utilize the federal discovery rules as a sword to obtain discovery from United States citizens, while simultaneously hiding behind the Hague Evidence Convention to shield themselves from identical discovery. There exist no "special and important reasons" to justify

---

[1] Formally, The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 255, T.I.A.S. No. 7444, 28 U.S.C.A. §1781 (1994).

this Court's exercise of discretion to review a magistrate judge's memorandum opinion and order implementing Aerospatiale in a discovery proceeding in a pending action. The bizarre posture of this case before this Court evidences petitioner's stratagem to appeal every adverse issue and to delay the trial in this five year-old certified environmental class action for as long as possible. This Court should not tolerate petitioner's misuse of the appellate courts. The petition for a writ of mandamus should be denied.

I. AEROSPATIALE WAS PROPERLY DECIDED AND HAS PROVEN WORKABLE IN PRACTICE.

Petitioner requests this Court to "reconsider and reverse its precedent" established only seven years ago in Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987). Petitioner brands this Court's holding in Aerospatiale "unsound in principle and unworkable in practice". Petitioner is wrong.

Not one United States circuit court of appeals, not one federal district court and not one state court has shared petitioner's view. Since 1987, of thirteen reported decisions applying Aerospatiale, petitioner concedes that three "have ordered litigants to use the Hague Evidence Convention procedures," while ten "have ordered litigants to use the federal rules". None of the state and federal courts which have implemented Aerospatiale have questioned its soundness in principle. Each has found the Aerospatiale's analysis workable.

The overwhelming majority of the reported decisions -- like the district court and court of appeals decisions in the cause sub judice -- have upheld the right to discovery under the federal rules. A minority of decisions have favored Hague Evidence Convention procedures. This split evidences the fact that courts are properly employing the case-by-case analysis posited in Aerospatiale. Notably, in two of the three states which have seen decisions in favor of first resort to the Hague Evidence Convention, subsequent court decisions in those same states have ordered discovery under the federal rules. Cf. Hudson v. Herman Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (Hague) with Haynes v. Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988) (federal rules), Scarminach v. Goldwell GmbH, 140 Misc.2d 103, 531 N.Y.S.2d 188 (1988) (federal rules), and Erbach Finance Corp. v. Royal Bank of Canada, 199 App.Div.2d 87, 605 N.Y.S.2d 52 (First Dept. 1993) (federal rules). Also cf. Knight v. Ford Motor Co., 260 N.J. Super. 110, 615 A.2d 297 (1992) (Hague) with Moake v. Source International Corp., 263 N.J. Super. 455, 623 A.2d 263 (1993) (federal rules). The district court and court of appeals decisions in the cause sub judice properly apply Aerospatiale in a manner consistent with this Court's holding and uniformly and unanimously reach a result consistent with the clear majority of decisions implementing Aerospatiale.

There is no reason, whatsoever, for this Court to reconsider, much less reverse, a seven-year-old decision which is based on sound principles and which has proven so workable in the federal district courts that there is not one reported post-Aerospatiale decision from any United States court of appeals, nor any petition requesting this

Court's reconsideration of Aerospatiale -- apart from this action. This case hardly presents to this Court "special and important reasons" justifying its exercise of discretion to grant petitioner's request for review.

II. THE JUDICIAL SYSTEM-ABUSING STRATAGEM EMPLOYED BY PETITIONER TO BRING THIS ISSUE BEFORE THIS COURT PRECLUDES PETITIONER'S ENTITLEMENT TO REVIEW.

Petitioner glosses over the bizarre machinations which it employed to bring this case before this Court. Petitioner asks this Court to review -- bottom-line -- a magistrate judge's memorandum opinion and order overruling petitioner's motion for a protective order as part of pretrial discovery in a pending civil action! The only case cited by the magistrate judge is Aerospatiale. Petitioner appealed that adverse ruling to the district court, which cited only one case in affirming the magistrate judge's decision: Aerospatiale.[2] Petitioner then filed a petition for a writ of mandamus in the Sixth Circuit Court of Appeals. The appellate court's order cited only one case addressing the merits of petitioner's

---

[2] Prior to affirming the magistrate judge's memorandum opinion and order addressing Aerospatiale, the district court overruled petitioner's Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of in personam jurisdiction. The district court held that respondents -- even absent discovery from petitioner -- established a prima facie showing of an alter-ego relationship between petitioner and its wholly-owned United States subsidiary.

claim: Aerospatiale. The Sixth Circuit unanimously denied the mandamus petition, holding that petitioner had not established "a clear and indisputable right to relief in mandamus as a result of the district court's decision." In summary, this Court is being asked to review a unanimous appellate court denial of a petition for a writ of mandamus challenging a district court's affirmation of a magistrate judge's memorandum opinion and order denying a motion for a protective order. That is hardly an appropriate function for this Court in our jurisprudential system.

III. PIED PIPER-STYLE COMMENTARIES BY SOME STUDENTS, ACADEMICS AND PRACTITIONERS, WITHOUT ANYTHING MORE, ARE AN INSUFFICIENT BASIS FOR THIS COURT TO RECONSIDER AND REVERSE A RECENT DECISION THAT HAS BEEN WELL-RECEIVED BY EVERYONE ELSE, INCLUDING THE FEDERAL AND STATE COURTS.

Petitioner predicates its contention that Aerospatiale should be reversed on nothing more than a collection of articles -- which petitioner never cited below -- by some students, academics and practitioners criticizing Aerospatiale in Pied Piper fashion. The clear majority of those articles were written before, and thus fail to take into account, many of the thirteen -- with this case, fourteen -- reported decisions which establish the soundness and workability of this Court's holding. The critique of these students and academics is not shared by the very courts which have borne the responsibility for

implementing Aerospatiale on a case-by-case basis. Those courts have found little difficulty whatsoever in performing this relatively simple task.

The student-authors have no knowledge of the day-to-day workings of international discovery and the academics are usually divorced from the practice. As for those practitioners who have written on the subject -- they have often taken up the pen to further the undisclosed interests of their foreign clients. Those practitioners advocate -- bottom-line -- the proposition that foreign interests doing business in the United States may hide behind an impenetrable veil of corporate secrecy (in Germany, for example, where there is no such thing as pretrial document discovery) sewn by **their** sovereign to avoid precisely the full and fair discovery to which any United States corporation would be subject. If foreign interests doing business in the United States are not governed by the same judicial system and the same rules applicable to United States citizens, the playing field is unjustifiably and unfairly skewed. In this cause, for example, petitioner has repeatedly used the federal rules as a sword to obtain document discovery from respondents, while simultaneously using the Hague Evidence Convention in order to shield itself from identical discovery requests.

IV. PETITIONER NEVER ASSERTED, IN THE LOWER COURTS, THAT AEROSPATIALE SHOULD BE REVERSED. PETITIONER MAY NOT DO SO, FOR THE FIRST TIME, IN THIS COURT.

Petitioner never asserted, in the courts below, that Aerospatiale should be reversed. Indeed, petitioner consistently argued that Aerospatiale, properly applied, compelled the granting of the relief which it requested. Petitioner now switches its theory and -- for the first time, in this Court -- attacks Aerospatiale, urging not its implementation, but its reversal.

Petitioner is well-aware that this Court would not accept jurisdiction to simply review whether or not a lower court properly applied Aerospatiale to the facts before it. This Court should not countenance petitioner's stratagem of rewriting its position regarding Aerospatiale before this Court in an effort to cause this Court to accept jurisdiction which it otherwise would have summarily denied. Petitioner's first-time challenge to Aerospatiale in this Court is yet another reason which should compel this Court to refrain from any exercise of jurisdiction.

V. PETITIONER IS BEFORE THIS COURT ONLY TO DELAY, FOR AS LONG AS POSSIBLE, THE COMMENCEMENT OF TRIAL IN THIS FIVE YEAR-OLD, CERTIFIED ENVIRONMENTAL CLASS ACTION.

This certified environmental class action has been pending for nearly five years. Defendants are alleged to have contaminated, contributed to and furthered the contamination of, thirty miles of a pristine creek, wetlands and floodplain with toxic and hazardous chemicals, including a banned, carcinogenic pesticide which has been detected throughout the affected area and in the bodies of class members. Petitioner's appeals from every adverse ruling of the magistrate judge, petitioner's mandamus petition in the Sixth Circuit, and petitioner's petition for certiorari in this Court are all part of a master stratagem to delay the trial of this cause as long as possible -- while the class and the environment continue to suffer the effects of Ohio's largest environmental debacle. Indeed, even as its petition pends before this Court, petitioner continues to refuse to provide the discovery which the district court and the court of appeals have held must be produced.

CONCLUSION

The petition for certiorari should be denied. In no other case has this Court been asked to reconsider, much less reverse, Aerospatiale. Aerospatiale's soundness and proven workability is the reason why. Aerospatiale is

good law and the courts know it. Congress has known about Aerospatiale for seven years and has done nothing to criticize the decision or to legislate in the field. There are far more important issues for this Court to consider than petitioner's personal pique with a magistrate judge's memorandum opinion and order in a discovery proceeding in a pending action.

For all of the reasons posited above, petitioner's request for a writ of certiorari to review the appellate court's unanimous dismissal of petitioner's petition for a writ of mandamus to order a district court to reverse a magistrate judge's memorandum and order, and to require all discovery of petitioner to be pursuant to the Hague Evidence Convention, should be denied.

Respectfully submitted,

DENNIS E. MURRAY, SR.
Counsel of Record

KIRK J. DELLI BOVI
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Post Office Box 19
Sandusky, Ohio 44871-0019
Telephone: (419) 624-3000

Counsel for Respondents

November 30, 1994